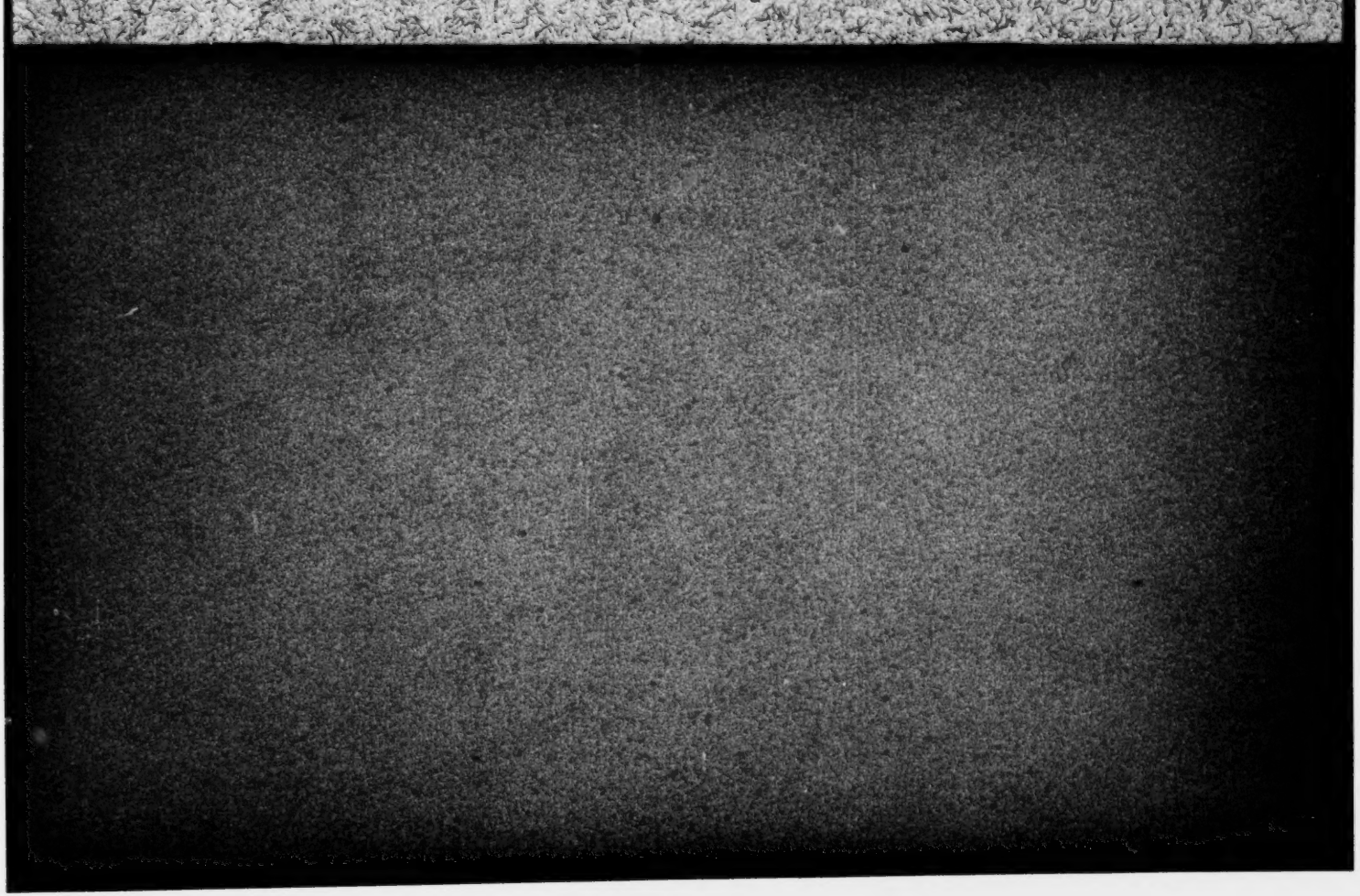

SUPREME COURT U. S.

MAY 13

MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1973

No. 73-1551

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

DELTA AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT OPPOSING CERTIORARI

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May 16, 1974

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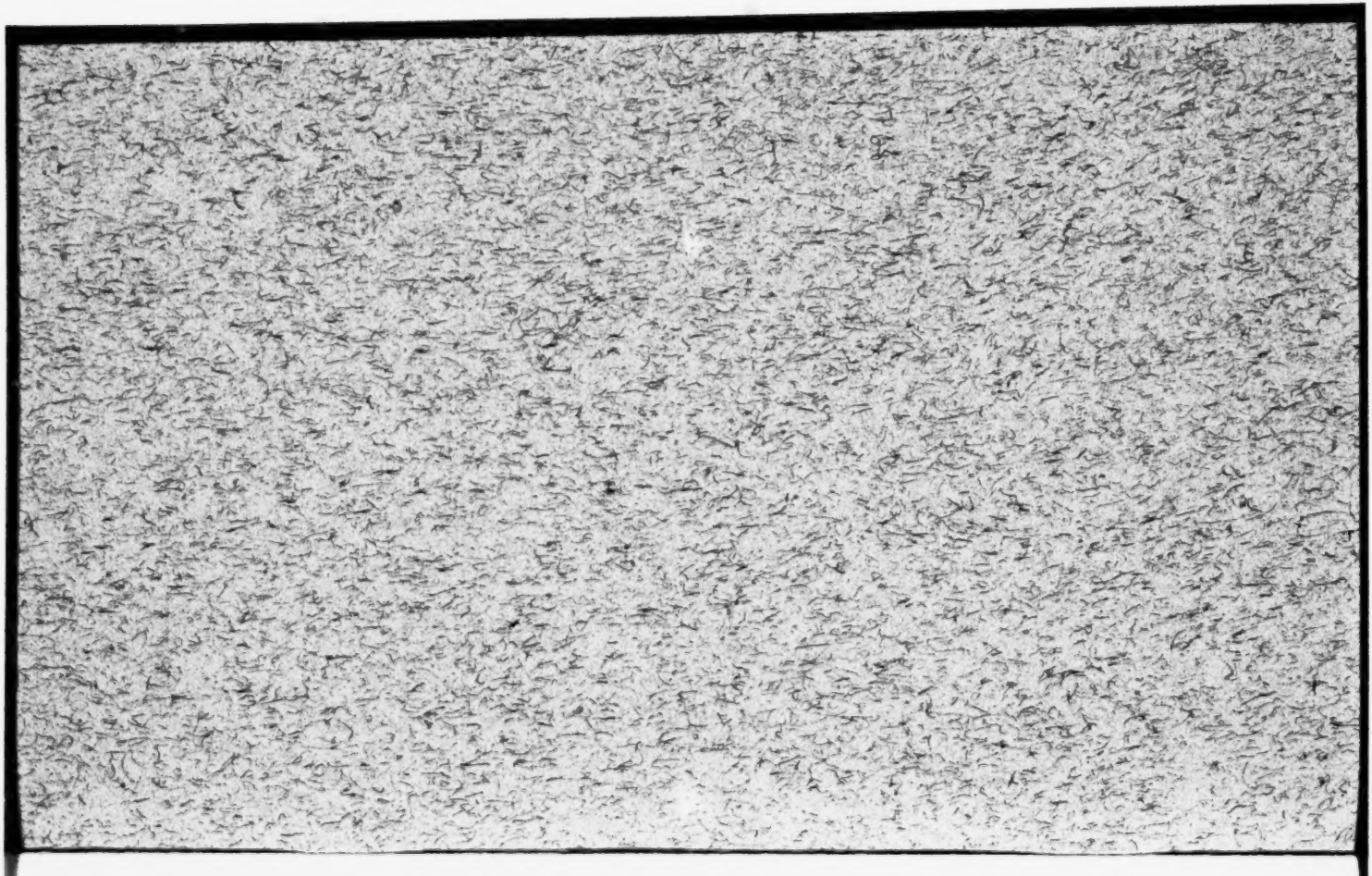

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This is a tort case governed by the law of Kentucky. The issues are between Trans World Airlines, Inc. ("TWA") and its subrogated insurer Federal Insurance Company ("Federal") on the one side, and Delta Air Lines, Inc. ("Delta") on the other.

The petition presents no grounds recognized by this Court as compelling review by certiorari.

No federal question appears. The constitutional question petitioner tenders is a spurious one.

There is no dispute concerning the law of Kentucky. Petitioner does not claim the Court of Appeals decided any question contrary to Kentucky law.

There is no claim that the decision below is in conflict with the decision of another Court of Appeals.

The issues are factual—whether, as petitioner contends, the evidence gives rise to jury questions on proximate cause and contributory negligence, or whether, as the Court of Appeals held, the undisputed evidence allows but one conclusion and hence under applicable Kentucky law those issues are matters of law for determination by the court.

QUESTION PRESENTED

Petitioner's statement of the Question is unacceptable. The question actually presented is—

> Whether the Court of Appeals correctly held, pursuant to the controlling law of Kentucky, that the undisputed evidence demonstrated as a matter of law (a) that the conduct of Delta was not a proximate cause of the casualty and (b) that TWA was guilty of contributory negligence which proximately caused the crash of its plane.

Seventh Amendment Is Not Involved

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court in the United States, *than according to the rules of the common law.**

As the Court of Appeals noted (Pet. for Cert., 53a):

> In our review of this case, we are, of course, mindful of the general rule that the question of

*Emphasis supplied throughout.

proximate cause is for the jury to determine. *See* W. Prosser, *Law of Torts* § 52, at 329 (3d ed. 1964). However, the Kentucky courts have recognized that,

> "where the uncontradicted evidence is such that only one conclusion can be drawn therefrom by fair-minded men and that conclusion is that negligence of a party to an accident was the proximate cause, there is no issue of fact to be submitted to the jury and the court has the duty of determining the case as a matter of law." *Jewell v. Dell*, 284 S.W.2d 92, 95 (Ky. 1955).

The court below also followed Kentucky law in its holding on contributory negligence, saying (Pet. for Cert., 59a-60a):

> We hold that the action of TWA against Delta was barred by contributory negligence on the part of the crew of the TWA plane. Contributory negligence is a defense in bar under Kentucky law. *Williams v. Chilton*, 427 S.W.2d 586, 591 (Ky. 1968); *Banner Transfer Co. v. Morse*, 274 S.W.2d 380, 382 (Ky. 1954).
>
> Ordinarily such question is for resolution by the jury. *Banner Transfer Co. v. Morse*, 274 S.W.2d 380, 382 (Ky, 1954); *Padgett v. Brangan*, 228 Ky. 440 (1929); *Hardware Mutual Casualty Co. v. Union Transfer & Storage Co.*, 205 Ky. 651 (1924). However, "where fair-minded men may properly draw but one conclusion from the testimony adduced, the question of whether or not a person is guilty of contributory negligence becomes a matter for the court to decide." *Louisville & Nashville Railroad v. Hines*, 302 S.W.2d 553, 556 (Ky. 1956). *See Banner Transfer Co. v. Morse, supra*, 274 S.W.2d at 382.

And further (*Id.* at 62a):

> We are satisfied that upon fair consideration of the evidence the only conclusion that can be reached is

that negligence of the TWA crew contributed to the casualty. This we hold as a matter of law, and appellee's action must accordingly fail. *Louisville & Nashville Railroad v. Hines*, 302 S.W.2d 553 (Ky. 1956): *Banner Transfer Co. v. Morse*, 274 S.W.2d 380, 382 (Ky. 1954).

The analysis of the facts by the Court of Appeals was in accordance with the law of Kentucky. The Seventh Amendment is not involved. Nor is the judgment of the Court of Appeals in any way contrary to this Court's decisions in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935) or *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355 (1962).

Petitioner's Statement of the Case is Inaccurate

Many of the statements in petitioner's statement of the case are not supported by any evidence in the record, and in some instances are directly contrary to undisputed evidence. The statement of the facts by the Court of Appeals is meticulously accurate (Pet. for Cert., 36a-67a).

Petitioner fails to mention critical facts which were stipulated at the trial or about which there was no dispute in the evidence, viz.:

1. At no point does the petition make clear that during TWA's entire take-off roll Delta's DC-9 was mired motionless in soft ground completely off of the active runway so that the closest part of Delta's plane was seven feet off the runway.

2. Both of TWA's pilots testified that when their aircraft had approached to within approximately one-quarter mile of the mired Delta plane, they clearly saw the Delta DC-9 and observed that it was stopped and *was clear of the runway*.

3. It was conceded by all parties that there never was any contact between the TWA and Delta planes. The wing tip of TWA cleared the Delta tail cone by approximately 30 feet.

4. The conclusion of the young and inexperienced TWA first officer that his plane had collided with the Delta aircraft was admittedly wrong. There was no reason or need to abort the take-off. It could have been continued in complete safety, whereas the abort was doomed to failure from the start.

5. Petitioner's definition of V_1 (Pet. for Cert., 9, 17) is contrary to the evidence and contrary to TWA's own manuals. Petitioner erroneously states (Pet. for Cert., 17) that a N.T.S.B. investigator testified "that V_1 speed is referable only to engine failure and that take-off beyond V_1 is not called for if structural damage is suspected." His actual testimony was to the contrary. He testified in response to questions by counsel for TWA-Federal (Court of Appeals Appendix, 443):

> A. V_1 is the decision speed at which the—beyond that point the crew is committeed to fly the airplane.
>
> * * *
>
> Q. Is the V_1 speed related to any other type of failure or damage, other than a failure of an engine?
>
> A. *Any decision where you feel that the airplane would not fly is supposed to be made prior to V_1, V_1, and prior to it.*
>
> Q. *Would that refer to structural damage?*
>
> A. *Very definitely.*

6. The undisputed evidence was that immediately prior to the abort the speed of the TWA plane had reached 142-143 knots—well above V_1, the highest speed at which an abort can be safely accomplished. TWA's own regula-

tions forbade an abort at that speed and directed the pilot to continue the take-off.

7. TWA's first officer who was making the take-off did not know his plane had reached a speed well above the V_1 speed—and in fact even above V_R—because the TWA captain had failed to call out the critical V_1 and V_R speeds as he was required to do by TWA's manuals and procedures.

Why George W. Rosenthal is named a respondent in this petition is not clear. He was not a party to the appeal in the Sixth Circuit and is in no way involved in the case at this point. Nor do we comprehend the failure to name Federal as a petitioner. Federal was a subrogated insurer of TWA and paid TWA more than twice the full amount of the loss resulting from the crash. As such Federal was a party in the district court and in the Court of Appeals. Under the undisputed evidence Federal was the *only* real party in interest with respect to the claim for loss of the TWA aircraft and the failure to name it as a petitioner would seem to be a fatal defect.

CONCLUSION

The Court of Appeals was not unmindful of the general rule that proximate cause and contributory negligence are usually questions for the jury. It recognized and followed the established common law of Kentucky that where uncontradicted evidence is such that only one conclusion can be drawn therefrom by fair-minded men, there is no issue of fact for the jury and the court has the duty of determining the issue as a matter of law.

The opinion below demonstrates the care and perception with which the Court of Appeals analyzed the facts and the logical and precise approach it made to a determination of the issues.

A careful reading of the unanimous opinion of the Court of Appeals will demonstrate that the charges of error in the petition for certiorari are without merit.

The petition should be denied.

Respectfully submitted,

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